SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCO* [2013] QCA 328
PARTIES:	**R** **v** **BCO** (applicant)
FILE NO/S:	CA No 145 of 2013 DC No 15 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Townsville
DELIVERED ON:	1 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2013
JUDGES:	Margaret McMurdo P, Morrison JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence allowed.** **3. The sentence is varied to the extent only of setting aside the order recording a conviction on count 1 and substituting the order that no conviction is recorded on count 1.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where applicant pleaded guilty to one count of rape and one count of indecent treatment of a child under 16 with a circumstance of aggravation – where the applicant was 15 years 11 months' old at the time of offending – where the applicant was sentenced to two years' probation pursuant to s 176(1) of the *Youth Justice Act* 1992 (Qld) – where a conviction was recorded for the count of rape, but not the other count – where the sentencing judge assumed the recording of the conviction would not adversely impact the applicant or his employment prospects – whether the sentencing judge erred in acting on that assumption – where discretion to record or not record a conviction to be exercised afresh – whether the balance of the factors favours recording a conviction *Youth Justice Act* 1992 (Qld), s 176, s 183, s 184

R v Cay; ex parte Attorney-General (Qld) (2005) 158 A Crim R 488; [2005] QCA 467, cited
R v SBR [2010] QCA 94, cited
R v SBY [2013] QCA 50, cited

COUNSEL: M J Copley QC for the applicant (pro bono)
P J McCarthy for the respondent

SOLICITORS: Aboriginal & Torres Strait Islander Legal Service (Queensland) for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Mullins J's reasons for granting this application for leave to appeal against sentence and allowing the appeal to the extent of setting aside the order recording a conviction on count 1 and substituting the order that no conviction is recorded on count 1.

[2] **MORRISON JA:** I have had the advantage of reading the reasons of Mullins J. I agree with those reasons and the orders proposed by her Honour.

[3] **MULLINS J:** The applicant pleaded guilty to one count of rape (count 1) committed on 19 June 2011 when he was almost 15 years 11 months old and one count of indecent treatment of a child under 16 with a circumstance of aggravation (count 2) committed at the same time. On 12 April 2013 he was sentenced to two years' probation pursuant to s 176(1) of the *Youth Justice Act* 1992 (the Act). A conviction was recorded for count 1, but no conviction was recorded for count 2.

[4] The applicant applies for leave to appeal against the sentence on the ground that the learned sentencing judge erred in ordering that a conviction be recorded for the offence of rape.

The circumstances of the offences

[5] The complainant who was aged four years lived next door to the house where the applicant resided with an aunt. The complainant's father invited the applicant over to his house, so that the applicant could play with the complainant and her brother who was about the same age as the applicant. The father later observed that the applicant had the complainant seated in his lap and that the applicant's hand was touching her groin area. The father called his daughter upstairs and saw that her underwear was not covering the area of her crotch. The complainant told her father that the applicant had scratched her with his fingernails and pointed to the area of her genitals and that she had seen the applicant's penis and he had wanted her to put it into her mouth.

[6] The complainant's father confronted the applicant. At first he denied doing anything, but when the father said that he saw him, the applicant admitted that he did and said he was sorry and that he would not do it again. When a relative joined the conversation the applicant said that he did not do anything and that the complainant grabbed his penis first.

[7] When interviewed by the police the complainant said the applicant had put his penis in her mouth, that he had ejaculated in her mouth and that she spat it out. That was

the basis of the offence of rape. The complainant told police the applicant had pulled her skirt and underwear down and rubbed and scratched her vagina. That constituted the indecent treatment offence.

The applicant's antecedents and personal circumstances

[8] The applicant is Aboriginal. He pleaded guilty to both offences on 25 September 2012 when the trial was due to begin. The sentencing was adjourned to allow for the preparation of a pre-sentence report.

[9] The applicant had been dealt with in the Childrens Court on 16 March 2009 for a range of property offences committed in February 2009 when he was 13 years old for which he was referred to a youth justice conference and no conviction was recorded.

[10] On 19 August 2012 whilst on bail awaiting trial for the subject offences, the applicant committed four property offences and two offences under the *Bail Act* 1980. He was dealt with for those offences in the Magistrates Court on 28 March 2013 when he was ordered to perform 200 hours community service and to make $60.90 restitution, but no convictions were recorded. On 25 March 2013 he was convicted in the Magistrates Court and fined $50 for contravening a direction or requirement on 3 March 2013 under the *Police Powers and Responsibilities Act* 2000. On 26 March 2013 the applicant committed nine property offences, one drug offence and one offence under the *Bail Act* 1980 for which he was also dealt with in the Magistrates Court on 28 March 2013. He was ordered to undergo 18 months' probation and to pay compensation totalling $350. No convictions were recorded. On the same date he was also dealt with for possessing dangerous drugs on 25 February 2013, but he was not further punished and no conviction was recorded. The applicant was on bail waiting to be sentenced for the subject offences when he committed the offences in February and March 2013.

The statutory framework

[11] The recording of a conviction under the Act is dealt with in s 183:

> "(1) Other than under this section, a conviction is not to be recorded against a child who is found guilty of an offence.
>
> (2) If a court makes an order under section 175(1)(a) or (b), a conviction must not be recorded.
>
> (3) If a court makes an order under section 175(1)(c) to (g) or 176 or 176A, the court may order that a conviction be recorded or decide that a conviction not be recorded."

[12] Section 184(1) of the Act prescribes the considerations relevant to whether or not to record a conviction:

> "(1) In considering whether or not to record a conviction, a court must have regard to all the circumstances of the case, including—
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> (a) the nature of the offence; and
>
> (b) the child's age and any previous convictions; and
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> (c) the impact the recording of a conviction will have on the child's chances of—
>
> (i) rehabilitation generally; or
>
> (ii) finding or retaining employment."

The sentencing

[13] The prosecutor had submitted that it was appropriate in this case considering the very serious nature of the offence, the young age of the child, the impact on the child and her family and that the applicant was almost 16 years old at the time of the offence, to record a conviction. Counsel on behalf of the applicant submitted against the recording of a conviction on the basis of the applicant's positive prospects of rehabilitation and that, if a conviction were recorded, the applicant would be a reportable offender.

[14] In the course of the sentencing remarks, the sentencing judge explained that he was greatly assisted by the psychological report that expressed the opinion that the applicant presented "a low to moderate risk of offending again in a sexual way" and noted that "the combination of individual and situational vulnerabilities associated with opportunity and absence of consideration of consequences played a role" in the offending. After referring to the comparable authorities, the sentencing judge expressed the view "that the criminality involved in your offending is not so great as the degree of criminality involved in similar offending, for example, by an adult." After referring to the sentencing principles set out in the Act, the sentencing judge placed the applicant on probation for a period of two years with a special condition that required him to engage with specialist services to address sexual offending behaviour by attending the Griffith Youth Forensic Service or any other program as directed by Youth Justice and that he must comply with all reasonable requirements of the program and maintain a rate of progress that is satisfactory to the management of the program.

[15] During the sentencing remarks, the sentencing judge noted the relevance of *R v SBY* [2013] QCA 50 in providing useful guidance as to the recording of a conviction.

[16] The sentencing judge explained his decision to record a conviction for the offence of rape in these terms:

> "Finally, I have to consider the issue of the recording of a conviction. I have full regard, of course, to the matters set out in section 184 of the Youth Justice Act. In determining whether to record a conviction, I must have regard to those matters, the starting point being that a conviction is not to be recorded against a child convicted of an offence. There are serious aspects to this offending, not the least of them being the age of the complainant and the nature of the act.
>
> The material before me indicates that there have been ongoing consequences for her.
>
> The other matter of concern to me in relation to you is the fact that you have reoffended, not in a similar way, but you have reoffended since this incident. You were dealt with in the Childrens Court at Mount Isa not so long ago.
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> It is submitted by [the applicant's counsel] that the consequences of a conviction requiring you to report pursuant to the relevant legislation is a matter which would cause me not to record a conviction against you. I accept that that is a relevant factor to take into account. So much was stated by Muir JA in the matter of SRB [2010] QCA 94. However, it is not a conclusive factor as the Court recognised in the matter of KU, to which I have referred.

> There is no suggestion here that the recording of a conviction would impact adversely on you, that is, on your rehabilitation or on your prospects of obtaining employment. Weighing all of these matters in respect of the offence of rape, I record a conviction against you. I will not record a conviction in respect of the other matter."

Was there an error in recording the conviction?

[17] Mr Copley QC who appears *pro bono* in this application for the applicant submits that the sentencing judge erred in two respects. The first respect was in overlooking the sexual offending was the result of impulsive and opportunistic behaviour rather than a manifestation of sexual deviance, the probable risk of sexual recidivism was only low to moderate; and the applicant was considered to be a suitable candidate for offence-specific treatment and likely to benefit from that treatment. The second respect was in erroneously assuming that the recording of a conviction would not adversely impact on either the prospects of rehabilitation and/or employment.

[18] Mr McCarthy of counsel on behalf of the respondent sought to support the recording of the conviction on the basis that there were considerations favouring the recording of a conviction sufficient to displace the *prima facie* position under s 183(1) of the Act and outweigh the considerations supporting a decision not to record a conviction. The hearing of the application focused, however, on the second of the applicant's arguments on whether the sentencing judge erred in assuming that the recording of a conviction for count 1 would not adversely impact on the applicant's rehabilitation or his prospects of obtaining employment.

[19] As the applicant was sentenced to probation pursuant to s 176(1)(a) of the Act, the sentencing judge was given a discretion pursuant to s 183(3) of the Act as to whether or not to record a conviction. Section 184(1) of the Act mandates that in considering whether or not to record a conviction the court must have regard to all the circumstances of the case and one of the specific circumstances is the impact the recording of a conviction will have on the child's chances of rehabilitation generally or finding or retaining employment.

[20] Counsel who appeared for the applicant on the sentencing did not concede that the recording of a conviction would not adversely impact on the applicant's prospects of rehabilitation and/or employment.

[21] Courts have proceeded on the assumption that the recording of a conviction will impinge adversely on a child's rehabilitation and employment prospects: *R v SBR* [2010] QCA 94 at [23]. As was observed by Mackenzie J in *R v Cay; ex parte Attorney-General (Qld)* (2005) 158 A Crim R 488 at [74] and [75]:

> "74. Section 12(2)(c) speaks of the impact a conviction 'will' have on the offender's economic or social wellbeing or chances of finding employment. This involves an element of predicting the future. Ordinarily, the word 'will' in that context would imply that at least it must be able to be demonstrated with a reasonable degree of confidence that those elements of an offender's life would be impacted on by the recording of a conviction. The notion of impact on the offender's 'chances of finding employment' is another way of describing the impact of a conviction on the opportunity to find employment in the future or the potentiality of finding employment in the future.

> 75. In cases involving young offenders, there is often uncertainty about their future direction in life. Perhaps, because of this, the concept may, in practice, often be less rigidly applied than in the case of a person whose lifestyle and probable employment opportunities are more predictable."

[22] The authorities therefore strongly support as the starting point for a youth of the applicant's age being sentenced under the Act the inference that the recording of a conviction would have an adverse impact on the youth in respect of prospects for rehabilitation and employment. There was nothing in the circumstances applying to the applicant that justified the assumption that was made by the sentencing judge that the applicant would not be so affected by the recording of a conviction. There has therefore been an error made in the sentencing judge acting on this assumption in weighing up the factors relevant to whether or not to record a conviction for count 1. That discretion should be exercised afresh by this Court.

[23] The factors in favour of the recording of the conviction include the age of the complainant, the nature of the offence (though not penile/vaginal rape) and that the applicant had committed property offences prior to the subject offences and committed further property offences whilst on bail for the subject offences. It counts against recording a conviction that it would make the applicant a reportable offender under the *Child Protection (Offender Reporting) Act* 2004 for seven and one-half years which is at odds with the applicant's risk assessment as a low to moderate risk of sexual recidivism. Other factors against the recording of the conviction also include the age of the applicant, that the offending was opportunistic rather than a manifestation of sexual deviance and that the applicant was suitable for offence-specific treatment. It is also relevant that no convictions were recorded for the property offences for which the applicant was sentenced in March 2013.

[24] When all the relevant matters are taken into account including the inference that the recorded conviction would have an impact on the applicant's rehabilitation and employment, the exercise of the discretion conferred by s 183 of the Act favours no conviction being ordered for count 1.

Orders

[25] The orders that should be made are:

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed.
3. The sentence is varied to the extent only of setting aside the order recording a conviction on count 1 and substituting the order that no conviction is recorded on count 1.